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March 28, 2005

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Federal Communications Commission
Office of Secretary

VIA MESSENGER

Ms. Marlene K. Dortch
Secretary
Federal Communication Commission
445 12th Street, S.W.
Washington, D.C. 20054

Re: Petition for Forbearance Under 47 U.S.C. §160(c) from Application of Unbundling Rules that Limit Competitive Alternatives

Dear Ms. Dortch:

Attached for filing in the above-captioned docket is one original and four copies of the Petition for Forbearance of XO Communications, Inc., Birch Telecom, Inc., BridgeCom International, Inc., Broadview Networks, Eschelon Telecom, Inc., NuVox Communications Inc., SNiP LiNK LLC, and Xspedius Communications.

Please do not hesitate to contact me with any questions or concerns regarding this matter.

Sincerely,

Steven A. Augustino

DC01/KASSS/232537.1

ORIGINAL

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

MAR 28 2005

Federal Communications Commission
Office of Secretary

In the Matter of	)	
	)	
Petition for Forbearance Under	)	WC Docket No. _____
47 U.S.C. § 160(c) from Application of	)	
Unbundling Rules that Limit Competitive	)	
Alternatives	)	

PETITION FOR FORBEARANCE

XO Communications, Inc.
Birch Telecom, Inc.
BridgeCom International, Inc.
Broadview Networks
Eschelon Telecom, Inc.
NuVox Communications, Inc.
SNiP LiNK LLC
Xspedius Communications, Inc.

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Date: March 28, 2005

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PETITION FOR FORBEARANCE

XO Communications, Inc., Birch Telecom, Inc., BridgeCom International, Inc., Broadview Networks, Eschelon Telecom, Inc., NuVox Communications, Inc., SNiP LiNK LLC and Xspedius Communications, Inc. (collectively, "Joint Petitioners"), by their attorneys and pursuant to Section 1.53 of the Commission's rules,[1] hereby respectfully request that the Federal Communications Commission ("FCC" or "Commission") exercise its forbearance authority under Section 10 of the Communications Act of 1934, as amended (the "Act"),[2] and accordingly, forbear from applying several limitations on an incumbent LEC's unbundling obligations pursuant to Section 251(c)(3) of the Act.

Specifically, Joint Petitioners urge the Commission to forbear from applying (1) the wire center-based test for DS1 loop impairment to "predominantly residential" and "small office" buildings; (2) the DS1 dedicated transport cap to the use of DS1/DS1 EELs; and (3) eligibility criteria to the use of Enhanced Extended Links ("EELs"). These limitations, which were adopted or reaffirmed in the *Order on Remand* ("*Triennial Review Remand Order*" or

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1 47 C.F.R. § 1.53.

2 47 U.S.C. § 160 (c).

"*TRRO*"),[3] undermine competition by limiting competitive alternatives in instances where facilities deployment is not likely.

INTRODUCTION AND SUMMARY

In the *TRRO*, the Commission reconsidered rules identifying the circumstances in which incumbent LECs ("ILECs") must provide unbundled access to local switching, high capacity loops and high capacity dedicated transport. The Commission adopted these rules in response to a remand from the U.S. Court of Appeals for the D.C. Circuit. Although Joint Petitioners believe the resulting FCC rules violate the Act and are unsupported by the record in the *TRRO*, Joint Petitioners do not seek forbearance on that ground. Rather, as shown below, forbearance from applying the unbundling limitations is appropriate in the instances described because the Commission can best achieve its objectives of promoting competition and facilities deployment without the more general rules. Grant of forbearance will promote competition and remove regulations that unnecessarily limit the opportunity for competitive LECs ("CLECs") to offer telecommunications services in competition with ILECs.

First, the Commission should forbear from applying its wire center-based test for DS1 loop impairment to small buildings served by Tier 1 central offices. The *TRRO* attempts to foster competition by striking a balance between promoting the deployment of facilities and requiring unbundling where such deployment is uneconomic. However, the Commission's wire center-based impairment test as applied to smaller buildings doesn't promote the Commission's goal of facilities-based competition. Rather, the wire center-based test undermines the Commission's goal, to the detriment of both CLECs and consumers.

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[3] *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Order on Remand, WC Docket No. 04-313, CC Docket No. 01-338 (rel. Feb. 4, 2005) ("*Triennial Review Remand Order*") ("*TRRO*").

The undisputed evidence submitted in the *Triennial Review Remand* proceeding shows that CLECs cannot economically deploy loops to a building unless the CLEC's customer has at least three DS3's worth of traffic. In spite of that evidence, the Commission's wire center-based impairment test for DS1 loops restricts UNE access to buildings that fall below this economic threshold. As the Commission itself acknowledges, a wire center-based test fails to account for the particular characteristics of the buildings served by those wire centers. The result is an impairment determination that is substantially over-inclusive, denying DS1 loops for many buildings where facilities deployment is not likely to occur. Application of this rule therefore will harm competition by preventing CLECs from accessing customers located in such buildings and reducing the competitive alternatives available to customers in small buildings. In order to promote competition for customers in small buildings, the Commission should forbear from applying its wire center-based test for DS1 loop impairment to "predominantly residential" and "small office" buildings served by Tier 1 central offices.

Second, the Commission should forbear from applying the DS1 dedicated transport cap to DS1/DS1 Enhanced Extended Links ("EELs"). There is simply no rational basis for the DS1 transport cap. This is especially true given that DS1 transport is used almost exclusively in connection with DS1/DS1 EELs. The DS1 transport cap will undermine the use of those combinations, which the Commission has found to be an efficient network arrangement. The DS1 transport cap also is unnecessary to prevent carriers from "gaming." Accordingly, the transport cap is not necessary to protect consumers and is not in the public interest.

Lastly, the Commission should forbear from applying any eligibility criteria to the use of EELs. The Commission originally justified its EELs restrictions as necessary to protect against the substitution of EELs for long distance special access and to prevent "gaming" by

providers of "non-qualifying" services. However, the *TRRO* addressed these concerns with new rules that prohibit non-impaired uses directly. As the Commission noted in the *TRRO*, this decision substantially reduces the universe of special access circuits that might satisfy the eligibility criteria. Moreover, the Commission's impairment determinations themselves even further reduce the instances where UNEs are available, "protecting" against non-impaired uses of EELs. At the same time, the EEL criteria are overly restrictive, and would limit the availability of a UNE combination even though each individual UNE is available under the Commission's unbundling analysis. Forbearance from application of the EEL eligibility criteria is appropriate.

DISCUSSION

> The standard for forbearance is clear. Section 10(a) of the Act provides that
>
> .... the Commission ***shall forbear*** from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that -- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.[4]

Subsection (b) of the statute provides that the Commission may use a finding that granting forbearance "will enhance competition among providers of telecommunications services" as the basis for satisfying the public interest prong of the statute.[5]

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[4] 47 U.S.C. §160(a) (emphasis added).

[5] 47 U.S.C. §160(b).

The Commission has recognized that its forbearance obligation is an "integral part" of the Act's pro-competitive, de-regulatory framework designed to "make available to all Americans advanced telecommunications and information technologies and services 'by opening all telecommunications markets to competition.'"[6] It has previously found that it should apply its Section 10 authority "in light of the Act's overall goals of promoting local competition and encouraging broadband deployment."[7] Importantly, however, the Commission has also recognized that when applying its forbearance authority in furtherance of Section 706, Section 251(c), as the "cornerstone ...of the 1996 Act,"..."limit[s] the Commission's otherwise broad forbearance authority under [S]ection 10."[8] In this way, forbearance and Section 251 are intended to work in harmony, to promote competition through facilities deployment or through UNEs in circumstances where CLECs are impaired.

As provided in further detail below, Joint Petitioners have satisfied each prong of the forbearance test respecting the rules and policies for which they seek relief. Accordingly, the Commission must grant the instant request for forbearance.

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6 *Petition for Forbearance of Iowa Telecommunications Services, Inc. d/b/a Iowa Telecom Pursuant to 47 U.S.C. §160(c) from the Deadline for Price Cap Carriers to Elect Interstate Rates Based on the CALLS Order or a Forward Looking Cost Study*, Order, 17 FCC Rcd. 24319, 24321 (2002) at ¶6 *(quoting* Joint Explanatory Statement of Committee of Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 113 (1996)).

7 *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. 160(c)*, Memorandum Opinion and Order, WC Docket Nos. 01-338, 03-235, 03-260, 04-48 (rel. Oct. 27, 2004) ("*Verizon Forbearance Order*") at ¶20.

8 *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147 *et al.*, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, 13 FCC Rcd 24012 (rel. Aug. 7, 1998) ("*Advanced Services Order*") at ¶73.

I. THE COMMISSION SHOULD CREATE A "CARVE OUT" FOR DS1 LOOPS USED TO SERVE SMALL BUILDINGS

In the *TRRO*, the FCC attempts to foster competition by striking a balance between promoting the deployment of facilities on the one hand, and requiring unbundling where deployment is uneconomic on the other.[9] With those competing interests in mind, the Commission held inter alia that incumbent LECs ("ILECs") shall not be required to provide requesting carriers with unbundled access to DS1 loops in wire centers with more than (a) 60,000 business lines and (b) four fiber-based collocators.[10] The Commission selected "the area served by a wire center" as the appropriate geographic market to assess whether requesting carriers are impaired without access to ILECs' unbundled network elements ("UNEs").[11] In arriving at its decision, the Commission rejected an array of options offered by commenters, including several building-specific tests, finding that such tests raised administrability concerns, especially in light of the D.C. Circuit's prohibition on subdelegation in *USTA II*.[12] Further, the Commission stated that a wire center-based was compelled by the D.C. Circuit's directive that it consider both actual and potential competition.[13]

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9 *See e.g., TRRO* at ¶2 ("....this order imposes unbundling obligations only in those situations where we find that carriers are genuinely impaired without access to particular network elements and where unbundling does not frustrate sustainable, facilities-based competition."); *see also, TRRO* at ¶10 *citing TRO* at ¶¶97-98 ("...a requesting carrier is impaired 'when lack of access to an incumbent LEC network element poses a significant barrier to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic.'").

10 *See TRRO* at Appendix B, §51.319(a)(4).

11 *Id.* at ¶155.

12 *Id., citing United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

13 *Id.*

Joint Petitioners maintain that the Commission's wire center-based test for DS1 loop impairment creates a substantial risk of false findings of non-impairment.[14] Its failure to consider the particular characteristics of the buildings served by those high capacity loops results in a test that is over-inclusive, as the Commission itself has acknowledged. The undisputed evidence submitted in the *Triennial Review Remand* proceeding clearly shows that CLECs cannot economically deploy loops to a building unless the customer demand is equivalent to at least three DS3's worth of traffic.[15] Accordingly, Joint Petitioners request that the Commission forbear from applying its wire center-based impairment test to DS1 loops used to serve "predominantly residential" and "small office" buildings, where demand does not economically justify the deployment of loop facilities.

As provided in further detail below, Joint Petitioners have satisfied each prong of the forbearance test.

A. The DS1 Loop Impairment Test, As Applied to "Predominantly Residential" and "Small Office" Buildings, Is Not Necessary to Ensure that Charges, Practices and Classifications Are Just, Reasonable and Nondiscriminatory

The Commission has previously examined forbearance in the context of the wholesale market,[16] and thus has examined whether forbearing from rules governing carrier-to-

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14 Joint Petitioners believe the test may be unlawful even if additional modifications are made to reduce its over-inclusive reach.

15 *See, TRO* at ¶325 ("the record contains little evidence of [C]LECs' ability to self-deploy single DS1 capacity loops and scant evidence of wholesale alternatives for serving customers at the DS1 level").

16 *See e.g., Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. §160(c) from Application of the ISP Remand Order*, Order, WC Docket No. 03-171 (rel. Oct. 18, 2004) ("*Core Forbearance Order*") at ¶¶20-24 (forbearing from new market restrictions and growth caps on ISP-bound traffic); *see also, In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability,* Order on Reconsideration, CC Docket No. 98-147 et al. (rel. Aug. 4, 2000) ("*Advanced Services Recon Order*") (reaffirming a prior Commission finding that Section 706(a) does not

. . . *Continued*

carrier relationships is necessary to ensure that carriers' charges, practices and classifications are just, reasonable and nondiscriminatory. In the context of its section 10(a)(1) analysis, the Commission found that "competition is the most effective means of ensuring that...charges, practices, classifications, and regulations...are just and reasonable, and not unreasonably discriminatory."[17]

In the instant matter, the Commission's wire center-based test for Tier I DS1 loop impairment test, as applied to "predominantly residential" and "small office" buildings, actually impedes competition and therefore does nothing to ensure that charges, practices and classifications are just, reasonable, and nondiscriminatory. Indeed, the DS1 loop impairment test, as applied to predominantly residential and small office buildings, unjustly and unreasonably discriminates against requesting carriers attempting to serve customers at smaller locations. The plain fact is that the sunk cost of deploying loop facilities, coupled with the inherent lack of economies of scale, will prevent CLECs from serving predominantly residential and small office locations.[18] What will foster competition in the provision of telecommunications service to small locations (and thus will ensure that charges, practices and classifications are just, reasonable, and nondiscriminatory) is forbearing from the Tier 1 DS1 loop impairment framework as it applies to predominantly residential and small office buildings.

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provide an independent statutory basis to forbear from Sections 251(c) and 271 of the Act).

17 *Petition of U S WEST Communications Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, CC Docket No. 97-172, *Petition of U S WEST Communications, Inc., for Forbearance*, CC Docket No. 97-172, *The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, CC Docket No. 92-105, Memorandum Opinion and Order, 14 FCC Rcd 16252, 16270 (1999) at ¶31.

18 *See e.g.,, In the Matter of Unbundled Access to Network Elements*, WC Docket No. 04-313, Initial Comments of the Loop and Transport CLEC Coalition, filed Oct. 4, 2004 at pgs. 97-112 ("*Loop and Transport Coalition Comments*").

The Commission has stated that its DS1 loop impairment test is grounded in the "conclusion that competitive LECs can supply DS1-capacity service in buildings already served by a higher capacity facility."[19] That conclusion, however, assumes the existence of several conditions. It assumes that: (1) the CLEC can negotiate the necessary rights-of-way, municipal franchise, and building access agreements; (2) there is sufficient demand in the building to justify deploying DS3 loops; and (3) the CLEC can win the necessary customer(s) in that building and serve them for a period sufficient to recoup the costs of deploying the loop facilities. Again, CLECs have clearly evinced throughout these proceedings that they cannot economically construct loops to a building unless customer demand dictates the deployment of three DS3s.[20] In the case of small buildings in a Tier 1 wire center, the economic conditions for CLEC deployment are not met. Thus, there are not likely to be any CLEC-provided "higher capacity facilities" to small buildings in a Tier 1 wire center. If there are no higher capacity facilities, then it follows that DS1 capacity service could not be provided using these facilities. Moreover, a carrier could not deploy facilities solely to serve a DS1 capacity customer in a small building. Accordingly, the incentive effect of the rule on facilities deployment will be non-existent in this situation. Application of the rule denying UNE access will not promote additional facilities deployment to these small buildings.

The Commission has also stated that it looked to "whether it is likely that other competitive carriers have already deployed or will deploy such high-capacity facilities to buildings throughout the wire center serving area, thus making DS1-level use of those deployed

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19 *TRRO* at ¶171.

20 *See* n. 15, *supra.*

facilities potentially viable."[21] However, the Commission once again makes assumptions that do not hold true in the case of small buildings -- namely, (1) that other carriers have either deployed or will deploy facilities to these buildings and (2) that those carriers offer wholesale capacity on their DS3 loop facilities. As explained above, facilities deployment is unlikely for small buildings, regardless of where they are located. Further, the assumption of wholesale capacity is itself suspect in this instance. As explained during the course of the *Triennial Review* proceedings, the vast majority of CLECs that have deployed DS3 and OCn facilities are simply unable to offer wholesale capacity of their networks.[22] While the Commission *might have* been able to support its assumptions by pointing to AT&T and MCI as two of the largest self-provisioners of high-capacity loops (via their self-deployment of OCn loops), these two options now appear likely to disappear after those carriers' announced mergers plans.

In evaluating the instant request, the Commission should take into account changed circumstance since the release of the *TRRO*. To the extent that the wire center-based test for Tier 1 was ever necessary to ensure that requesting carriers' charges, practices and classifications are just, reasonable and nondiscriminatory, recent market developments militate in favor of a different finding for small buildings in the Tier 1 footprint. Indeed, the Commission has previously found that the first prong of the forbearance test is satisfied where recent

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21 *Id.*

22 *See e.g., In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket Nos. 01-338, 96-98, 98-147 (rel. Aug. 21, 2003) ("*Triennial Review Order*") ("*TRO*") at n. 958 (noting that, among other impediments, CLECs do not have the back office systems necessary to offer excess capacity to other CLECs). *See also, In the Matter of Unbundled Access to Network Elements*, WC Docket No. 04-313, Reply Comments of the Loop and Transport CLEC Coalition, filed Oct. 19, 2004 at 32 ("very few competitive carriers are in a position to offer wholesale facilities to other CLECs.").

marketplace developments events undermine the Commission's prior decisions.[23] Here, recent marketplace developments will render CLECs unable to provision Tier 1 DS1 loops to predominantly residential and small office locations using AT&T's and MCI's wholesale loop capacity (to the extent that such capacity even exists at those smaller locations).

Application of the DS1 loop impairment test to predominantly residential and small office buildings is similarly unnecessary to ensure that ILEC charges, practices and classifications are just, reasonable and nondiscriminatory. To the contrary, application of the rule to small buildings creates an unreasonable risk that ILECs will price wholesale inputs to those buildings in order to create a price squeeze. The *USTA II* court recognized as much, holding that "ILEC[s] [have] an incentive to set the tariff price as high as possible...."[24] The Commission relied in part on that recognition to find that "in the local exchange market, the availability of a tariffed alternative should not foreclose unbundled access to a corresponding network element, even where a carrier could, in theory, use that tariffed offering to enter the market."[25] The Commission explained that "a bar on UNE access wherever competitors could operate using special access would be inconsistent with the Act's text and its interpretation by various courts, would be impracticable, and would create a significant risk of abuse by incumbent LECs."[26] Accordingly, CLECs will be unable to serve predominantly residential and small office buildings in Tier I wire center areas by using the ILECs' special access services or

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23 *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. §160(c) from Application of the ISP Remand Order*, Order, WC Docket No. 03-171 (rel. Oct. 18, 2004) ("*Core Forbearance Order*") at ¶¶20-24 (finding that recent industry statistics indicate that expansion of the arbitrage opportunity presented by ISP-bound traffic is unlikely to occur given declining usage of dial-up ISP services).

24 *USTA II* at 576.

25 *TRRO* at ¶48.

26 *Id.*

by deploying their own loops. The only economically feasible means by which CLECs will be able to serve such small locations is through the use of UNE DS1 loops.[27]

In light of the forgoing, Joint Petitioners contend that the requirements of Section 10(a)(1) are satisfied.

B. The DS1 Loop Impairment Test, As Applied to "Predominantly Residential" and "Small Office" Buildings, Is Not Necessary for the Protection of Consumers

Far from being necessary for the protection of consumers, the Commission's Tier I DS1 loop impairment test harms consumers. The undisputed evidence submitted in the *TRO* proceeding clearly shows that requesting carriers cannot economically construct loops to a building unless customer demand is such that the customer's business requires at least three DS3s.[28] This is especially true of small buildings, where it is highly unlikely that customer demand will ever reach such levels. In fact, deployment to predominantly residential buildings likely would require significantly more aggregate capacity in order to make deployment economically viable.[29] Multiplexing a DS3 down to smaller capacities requires additional investment and creates additional costs for requesting carriers. Moreover, long term contracts are not common with residential customers, making a return on investment difficult to obtain when serving predominantly residential buildings.

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27 It is important to note that any perceived disincentive to facilities deployment as a result of UNE access is inapplicable here. In fact, the disincentive to serving predominantly residential and small office buildings is economic impairment -- not allegedly cheaper UNE access.

28 *See* n. 15, *supra.*

29 Joint Petitioners' estimates that deployment is possible at three DS3s of capacity assumes that a single customer would receive the service at that capacity.

The Commission itself acknowledged that a wire center-based approach may deny unbundling despite that competitive entry is uneconomic.[30] The Commission correctly recognized that CLECs face both economic and operational barriers to constructing their own loop facilities. The Commission found that because "[t]he economics of deploying loops are determined by the costs associated with such deployment and the potential revenues that can be recouped from a particular customer location," "[C]LECs do not typically construct fiber loops at lower capacity levels, such as DS1 or DS3...."[31] However, the Commission stated its belief that CLECs may be able to overcome the fixed and sunk costs of deploying loops through economies of scale. It explained that "economies of scale can accrue when carriers construct loops to locations that are geographically close to the transport network, assuming other barriers do not preclude construction." The Commission further explained that CLECs have attempted to take advantage of such scale economies by deploying fiber rings in urban areas "where the concentration of potential customer locations -- and thus revenue opportunities -- is very dense."[32] However, in order for CLECs to overcome the fixed and sunk costs of deploying loops to predominantly residential and small office buildings, CLECs would need to capture all or a substantial majority of the customers located at these small buildings.[33] Such a hurdle

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30 *TRRO* at ¶155.

31 *Id.* at ¶150.

32 *Id.* at ¶154.

33 *See TRO* at n. 890 (citing the need for firm customer commitments guaranteeing the likelihood of cost recovery).

constitutes an insurmountable barrier to entry in most cases and easily meets the Commission's definition of "impairment" adopted in the *TRRO*.[34]

A recent study by the Small Business Administration ("SBA") found that the primary beneficiaries of facilities-based CLEC services are small and medium-sized businesses.[35] This is due primarily to the beneficial effects of integrated T1 products, which were pioneered by CLECs. CLECs have been successful in luring customers to these integrated T1 service offerings by bundling advanced services, voice services, long distance calling plans, data and various calling features. Indeed, it was CLEC integrated T1 offerings that awoke the slumbering Bell companies and prompted them to deploy advanced services technology. As history has shown, ILECs will not deploy next generation services without competition (or a heavy regulatory hand to take its place).

Under the Commission's wire center-based test, small and medium-sized customers located at predominantly residential and small office buildings will no longer have such competitive choices for their telecommunications needs. Many of these customers may lose their integrated T1 services, and thus their broadband connections. Without CLECs to act as a competitive "check" in this market segment, ILECs will seek to leverage their monopoly power by raising rates for their retail services. Accordingly, the Commission must forbear from applying its Tier I DS1 loop impairment framework to predominantly residential and small office

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34 *See TRRO* at ¶¶21-22; *see also, TRO* at ¶¶84-91 (scale economies, sunk costs, first mover advantages, absolute cost advantages, and barriers within control of the ILEC are barriers to entry most likely to create impairment).

35 Stephen B. Pociask, TeleNomic Research LLC (for SBA Office of Advocacy), *A Survey of Small Businesses' Telecommunications Use and Spending* at pgs. Ii, 67, 71. (Mar. 2004) ("*SBA Study*") (finding that 29 percent of small businesses located in metropolitan areas subscribed to CLECs' services).

buildings in order to protect consumers from the ILECs' monopolistic practices and to foster competition for telecommunications services at smaller locations.

Lastly, the FCC has previously found that the second prong of the forbearance test is satisfied where its rules were not implemented specifically for the protection of consumers.[36] In granting Core Communications' forbearance petition, the FCC found that its growth caps and new markets restrictions "are directly related to intercarrier compensation, and were not implemented specifically for the protection of consumers."[37] Here, the Commission's Tier 1 DS1 loop impairment test was not implemented specifically for the protection of consumers, but rather in response to the courts' directive that it consider the costs of unbundling. Indeed, the Commission promulgated its impairment framework "to provide the right incentives for both incumbent and competitive LECs to invest rationally in the telecommunications market in the way that best allows for innovation and sustainable competition."[38] Commission precedent warrants a finding that the DS1 loop impairment test as applied to predominantly residential and small office building is not necessary for the protection of consumers.

For the foregoing reasons, Joint Petitioners aver that the requirements of Section 10(a)(2) are satisfied.

C. Forbearance From the Commission's Impairment Test For Tier I DS1 Loops used to Serve "Predominantly Residential" and "Small Office" Buildings Is Consistent with the Public Interest

As detailed above, predominantly residential and small business customers will only be able to receive service from their local monopoly provider, the ILEC, under the

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36 *Core Forbearance Order* at ¶26.

37 *Id.*

38 *TRRO* at ¶2.

Commission's existing impairment framework for Tier I DS1 loops. Granting forbearance in the instant matter, therefore, will promote competition in the provision of telecommunications services to predominantly residential and small business customers and protect consumers from harm.

Forbearance in the instant matter is also in the public interest because it allows the Commission to more precisely tailor its impairment determinations. The Commission's wire center-based test is a poor proxy for assessing impairment. The characteristics of the buildings to be served by those loops drive loop deployment, not the characteristics of the wire center. Indeed, the use of a wire center-based test is likely to create a number of false findings of non-impairment, since the wire center test applies to all buildings within the wire center footprint, regardless of size, demand, building access problems or other features related to loop impairment.[39] Joint Petitioners posit that the Commission's use of the wire center area as the geographic market to assess impairment very likely is unlawful, given that there is no nexus between the wire center area and loop impairment.

Furthermore, the Commission was wrong in rejecting all building specific tests as impractical to administer. There is simply nothing in *USTA II* that requires the Commission to use a wire center-based test to determine where impairment exists. Nor does the Commission need to delegate any decision making authority to the state commissions in order to conduct a more focused impairment analysis.[40] Nor does the D.C. Circuit's reference to potential

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39 *See TRO at* ¶¶302-306 (causes of impairment include customer demand, building access, rights of way/franchise agreements, and delays); *see also, TRO* at ¶¶84-91 (scale economies, sunk costs, first mover advantages, absolute cost advantages, and barriers within control of the ILEC are barriers to entry most likely to create impairment).

40 In any event, *USTA II* recognized that state commissions could be used in a fact-finding capacity, so long as the Commission made the ultimate decision. Therefore, although

. . . *Continued*

competition preclude the use of a more focused impairment analysis. Indeed, *USTA II* only required the Commission to consider similar transport routes to the extent that such routes shared the same characteristics relevant to the impairment analysis. Thus, the Commission is free to respond to the court's finding merely by identifying characteristics of buildings that are relevant to whether a carrier could construct facilities to that building, and grouping buildings based on those characteristics. The Commission adopted that type of approach as part of its route-specific test for dedicated transport [41] and could easily do so for loop impairment. The Commission could also make a building test easier to administer by using publicly available data, or by requiring reporting of data such as through FCC Form 477.[42]

Moreover, the Commission's concerns about the administration of a building-specific impairment test are simply overblown. A more nuanced test does not require that the Commission make factual determinations with regard to 3 million buildings in the United States.[43] In reality, the ILECs only alleged CLEC deployment to approximately 30,000 buildings nationwide, a much more manageable number than the Commission describes. Indeed, the Commission established its transport tests after analyzing data related to every one of the nearly 3,000 wire centers in the United States – representing tens of thousands of possible routes between wire centers. If it can analyze data necessary to make this determination, it is not far fetched to believe the Commission can obtain objective data concerning approximately 30,000

Joint Petitioners do not advocate a fact-finding proceeding at the states, *USTA II* does not preclude the Commission from adopting such an approach.

41 *TRRO* at ¶79 ("we depart from the *Triennial Review Order's* exclusive focus on the particular route at issue, and instead establish categories of routes, as defined by the economic characteristics of each end-point of the route, in order to better identify routes with similar economic traits"); *see generally* ¶¶69-110.

42 *Loop and Transport Coalition Comments* at 85.

43 *Id.* at ¶157.

buildings where deployment is alleged. In any event, the Commission has made impairment determinations of the sort it describes without the burdens ascribed to a building specific loop test. In the *UNE Remand Order*, the Commission found non-impairment for UNE switching for customers in the top 50 MSAs with 4 or more lines.[44] The Commission did not analyze the millions of end-user customers in the country and make impairment determinations with respect to each one. Nevertheless, the *USTA I* court cited approvingly to the impairment determination as an example of a granular impairment analysis.[45]

Notwithstanding the forgoing, the Commission can limit the impact of its overbroad wire center-based test by retaining its basic approach but creating a "carve-out" for Tier I DS1 loops used to serve predominantly residential and small office buildings. Joint Petitioners propose that the Commission define "predominantly residential" buildings in the same way that the Commission has defined this term for fiber-to-the-home loops.[46] Thus, the carve-out would apply in the same instances where ILECs may deploy broadband facilities with limited unbundling obligations.[47] Joint Petitioners further propose that the Commission define "small office" buildings by a measure that stands as a proxy for the demand in a building. Petitioners suggest that any building with less than four DS3s of total activated ILEC capacity should be defined as a "small office" building. A building with less than 4 DS3s of activated

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44 *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Notice of Proposed Rulemaking, CC Docket No. 96-98 (rel. Nov. 5, 1999) ("*UNE Remand Order*") at ¶278.

45 *United States Telecom Ass'n v. FCC*, 290 F. 3d 415, 423 (D.C. Cir. 2002) ("*USTA I*").

46 *See Review of Section 251 Unbundling Obligations Of Incumbent Local Exchange Carriers,* Order on Reconsideration, CC Docket No. 01-338, FCC 04-191 (rel. Aug. 9, 2004) *("251 Recon Order").*

47 Under the *TRO*, an ILEC remains obligated to provide DS1 loops to mass market customers. See *TRO* at n. 956. Joint Petitioners' request is consistent with this requirement.

ILEC capacity would require that a requesting carrier capture 75 percent of the building's total demand (using three DS3s as the crossover from UNEs to facilities construction) in order to deploy its own facilities. Joint Petitioners suggest that the ILECs could report this information using ARMIS data and its billing records.

For all of these reasons, the instant request for forbearance is in the public interest and Joint Petitioners therefore maintain that the requirements of Section 10(a)(3) are satisfied.

II. THE COMMISSION SHOULD FORBEAR FROM ENFORCING THE DS1 DEDICATED TRANSPORT CAP AS IT APPLIES TO DS1/DS1 EELS

In the *TRRO*, the Commission limited the number of DS1 transport circuits that a CLEC may obtain as a UNE. It is not clear whether the Commission intended this limit to apply "[o]n routes for which we determine that there is no unbundling obligation for DS3 transport," as stated in the text of the *TRRO*,[48] or on all DS1 routes, as Verizon and other ILECs have claimed.[49] In either case, however, there is simply no rational basis for the DS1 dedicated transport cap. This is especially true given that DS1 transport is used almost exclusively in connection with a DS1/DS1 EEL. In such a configuration, EEL impairment will always exist whenever DS1 impairment exists, regardless of the number of DS1 transport circuits obtained by a carrier. The Commission's rule as applied to DS1/DS1 EELs flies directly in the face of prior FCC pronouncements that EELs are efficient network arrangements which promote the deployment of advanced services.[50] As such, the cap runs counter to the Commission's goal of

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48 *TRRO* at ¶128.

49 *Reply Comments of Verizon New York in Support of its Tariff Filing Implementing the Triennial Review Remand Order,* NY PSC Case No. 05-C-0203, March 8, 2005 at 42 (arguing that paragraph 128 of the *TRRO* is inconsistent with the FCC's rule); §51.319(e)(2)(ii)(B).

50 *See e.g., TRO* at ¶576.

promoting competition. The Commission must therefore forbear from enforcing the cap as it applies to DS1/DS1 EELs.

As provided in further detail below, Joint Petitioners have satisfied each prong of the forbearance test.

A. The DS1 Transport Cap Is Not Necessary to Ensure that Charges, Practices and Classifications Are Just, Reasonable and Nondiscriminatory

The DS1 transport cap is unnecessary to ensure that requesting carriers' charges, practices and classifications are just, reasonable and nondiscriminatory. In fact, it is the DS1 transport cap itself that is unjust, unreasonable, and discriminatory. As stated above, it is unclear how the Commission intends the transport cap to apply. In either event, however, there is simply no rational basis for the DS1 transport cap.

First, the cap is unreasonable as applied to DS1/DS1 EELs. The Commission has previously found that EELs are efficient network arrangements which extend the reach of requesting carriers' networks, save collocation space and reduce collocation costs, thereby allowing carriers to serve customers they otherwise may be unable to serve.[51] The Commission has also found that EELs promote innovation by allowing carriers to offer advanced services over those combinations.[52] Application of the DS1 dedicated transport cap to DS1/DS1 EELs will undermine the Commission's goal of promoting this form of facilities-based competition. The cap will effectively preclude requesting carriers from provisioning these combinations given that DS1/DS1 EELs impairment will always exist whenever DS1 loop impairment exists, regardless of the number of DS1 transport circuits obtained by a carrier. Therefore, in order to stay true to its goal of fostering facilities-based competition and promoting the deployment of

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51 *Id.*

52 *Id.*

advanced services, the Commission should forbear from applying the transport cap to DS1/DS1 EELs.[53]

The DS1 transport cap is also unnecessary to prevent carriers from "gaming" by CLECs. Presumably, "gaming" in this context means the substituting of dozens or hundreds of DS1 circuits where higher capacity DS3 transport circuits could be used. At the outset, where a DS3 UNE is available, such activity, even if it were likely, can hardly be described as "gaming." It could be described as inefficient, but not an abuse of the rules. Nevertheless, the likelihood of any "gaming" is so remote as to be irrelevant. Higher capacity transport has efficiencies that extend beyond the lower per unit price of DS3 and OCn transport, including inventory management and fewer points of network failure. Moreover, each DS1 circuit carries with it installation and other non-recurring charges. These charges would be quite significant if a CLEC were to order dozens or hundreds of DS1 transport links. Carriers with multiple DS3s therefore are unlikely to convert those circuits to DS1s given the additional burdens that would apply. Indeed, there is no evidence that such activity occurs today.

Accordingly, the Commission should forbear from enforcing the DS1 transport cap as it applies to DS1/DS1 EELs in order to ensure that carriers' charges, practices, and classifications are just, reasonable and nondiscriminatory.

B. The DS1 Transport Cap Is Not Necessary for the Protection of Consumers

Like the wire center-based impairment test for loops, the DS1 transport cap was not specifically implemented for the protection of consumers and therefore is unnecessary to protect consumers. Furthermore, the cap is not only unnecessary but will actually work to hurt consumers by undermining the use of EELs. As stated above, the Commission has previously

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[53] As explained below, only the loop cap should apply to such EELs.

found that EELs are efficient network arrangements which allow carriers to serve customers they otherwise may be unable to serve.[54] Without access to more than 10 DS1 transport circuits per route, requesting carriers will be unable to provision DS/DS1 EELs and thus will be unable to serve customers in many cases. In light of the Commission's previous finding that the availability of EELs promotes innovation, the cap will also work to stifle the growth of new, feature-rich products and advanced services offered by CLECs.[55] Thus, forbearance from application of the cap will protect consumers, not harm them.

By creating a "carve-out" for DS1/DS1 EELs, the Commission also eliminates the anomaly created by the differences in the transport cap and the loop cap. In the *TRRO*, the Commission held that "requesting telecommunications carrier[s] may obtain a maximum of ten unbundled DS1 loops to any single building in which DS1 loops are available as unbundled loops."[56] (emphasis added). However, the DS1 transport cap applies at the wire center level, rather than at the building level, and thus is much more restrictive. By refraining from counting DS1/DS1 EELs toward the 10 circuit cap on DS1 transport, the FCC can effectively reconcile the difference between the two caps and allow CLECs to provision EELs based on the much more understandable building-based loop cap, to the benefit of telecommunications consumers.

Accordingly, the Commission must find that the DS1 transport cap as applied to DS1/DS1 EELs is not necessary for the protection of consumers.

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54 *TRO* at ¶576.

55 *Id.*

56 *Id.* at ¶181; 47 C.F.R. §51.319(a)(4)(ii).

C. Forbearance from Enforcing the DS1 Transport Cap Is Consistent with the Public Interest

As detailed above, granting forbearance in the instant matter will promote both innovation and competition by allowing requesting to carriers to serve customers that they might otherwise be unable to serve if the DS1 transport cap were to remain in place. Accordingly, Joint Petitioners maintain that the instant request for forbearance is in the public interest and should therefore be granted.

III. THE COMMISSION SHOULD FORBEAR FROM APPLYING ELIGIBILITY CRITERIA TO THE USE OF EELS

In its *UNE Remand Order*, the Commission asked if allowing requesting carriers to order loop and transport combinations at TELRIC rates would provide an opportunity for arbitrage of special access services and, if so, whether the Act provides a statutory basis to establish usage restrictions on those combinations.[57] The Commission later found that the Act provided a basis for such restrictions and in the *Supplemental Order* held inter alia that carriers may convert special access circuits to EELs if they provide a "significant amount of local exchange service."[58] The Commission clarified what constitutes a "significant amount of local exchange service" in its *Supplemental Order Clarification* by setting out three "safe harbors," under which a carrier would be presumed to be providing a "significant amount of local exchange service" and thus entitled to convert its special access circuits to EELs.[59] In the *Triennial Review Order*, the Commission replaced its safe harbors with certain eligibility criteria,

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57 *UNE Remand* at ¶494-96.

58 *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order, CC Docket No. 96-98 (rel. Nov. 24, 1999) ("*Supplemental Order*") at ¶ 2.

59 *See, In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order Clarification, CC Docket No. 96-98 (rel. June 2, 2002) ("*Supplemental Order Clarification*") at ¶ 21.

which if met, permit carriers to convert ILEC tariffed offerings to EELs.[60] Critically, that portion of the *TRO* was not vacated by the D.C. Circuit in *USTA II*.[61] After considering the remand, the *TRRO* simply re-adopted the EEL eligibility criteria put in place by the TRO.[62]

Importantly, however, the *TRRO* removed any rationale for the continued imposition of EEL eligibility criteria. The original justification for the usage restrictions having been removed, the Commission should forbear from applying eligibility criteria to the use of EELs. As provided in further detail below, Joint Petitioners have satisfied each prong of the forbearance test.

A. EEL Eligibility Criteria Are Not Necessary to Ensure that Charges, Practices and Classifications Are Just, Reasonable and Nondiscriminatory

The EEL eligibility criteria were never imposed is order to ensure that ILEC unbundling was just and reasonable. At the time the EEL eligibility criteria were first adopted, they were justified as necessary to protect against the substitution of special access used by IXCs to provide long distance services.[63] In the *TRO*, the Commission concluded that revised EEL eligibility criteria would prevent "gaming" by providers of non-qualifying services.[64] The Commission explained that by "gaming" it meant "the case of a provider of exclusively non-

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60 *TRO* at ¶¶ 585-589.

61 *USTA II* at 592-93. Notably, the Court only remanded to the Commission consideration of any "potential anomaly" that might be created if the FCC were to find on remand that CLECs currently using special access are not impaired without access to UNEs.

62 *TRRO* at n. 644; *see also, TRRO* at n. 244 ("we…do not disturb the EELs eligibility criteria").

63 *See, Supplemental Order Clarification* at ¶2 *citing*, *UNE Remand Order* at ¶¶485-489 (concerns that universal service could be harmed if FCC were to allow interexchange carriers to use the incumbent's network without paying their assigned share of the incumbent's costs normally recovered through access charges).

64 *TRO* at ¶591.

qualifying service obtaining UNE access in order to obtain favorable rates or otherwise engage in regulatory arbitrage."[65] The non-qualifying service to which the Commission referred was long distance service.

In response to the *USTA II* remand, the Commission has now directly prohibited the use of any UNE to provide exclusively long distance service.[66] Rule 51.309(b) renders the EEL eligibility criteria unnecessary to ensure that CLECs' charges, practices and classifications are just, reasonable and nondiscriminatory. Indeed, the Commission confirmed as much when it denied ILEC requests to prohibit all conversions.[67] In paragraph 230 of the *TRRO*, the Commission stated that "the rules we adopt today already prevent the use of UNEs...where carriers would use them *exclusively* to provide long distance services or mobile wireless services."[68] This finding, the Commission ruled, means that the special access circuits that the ILECs cited "are therefore largely shielded already from potential conversion to UNEs."[69] These same conclusions show that the EEL eligibility criteria are superfluous and that the Commission should forbear from enforcing them.[70]

B. EEL Eligibility Criteria Are Not Necessary for the Protection of Consumers

Like the wire center-based impairment test for loops and the DS1 transport cap, the EEL eligibility criteria were not specifically implemented for the protection of consumers. The criteria will actually harm requesting carriers, which will in turn work to harm consumers.

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65 *Id.* (the Commission determining that it was "under no obligation to make any changes to them at this time").

66 47 C.F.R. §51.309(b).

67 *See TRRO* ¶ 230.

68 *Id.* (emphasis added).

69 *Id.*

70 Additionally, the new rule is sufficient to ward against any risk of gaming.

Removal of those rules will allow for more innovative uses of UNEs to provide local services. For example, VoIP providers are not required to obtain local certification. Thus, the FCC's eligibility criteria could be interpreted by ILECs as prohibiting the provision of VoIP and other IP-enabled services over EELs. Similarly, the requirement that each DS1 circuit in a DS3 have a local number assignment and 911 capability imposes a circuit switched-based view in a more dynamic market.

Additionally, Rule 51.309(b), which directly prohibits CMRS providers and IXCs from using EELs to provide exclusively long distance service, already acts to protect consumers. Specifically, Rule 51.309(b) prevents carriers from bypassing special access charges and thereby protects the Commission's universal service programs, to the benefit of consumers.

Based on the foregoing, Joint Petitioners therefore contend that the EEL eligibility criteria are unnecessary to protect consumers and that the Commission should therefore forbear from enforcing them.

C. Forbearance from Application of the EEL Eligibility Criteria Is Consistent with the Public Interest

As described above, the EEL criteria are prophylactic rules that were designed to prevent carriers from bypassing special access charges and thereby undermining the Commission's universal service programs. In the *TRO*, the Commission declined to extend the requirements to UNEs other than EELs.[71] The Commission reasoned that "[t]he record does not indicate … misuse of voice-grade UNE loops, high-capacity loops, or other UNEs."[72] Similarly, the record is silent with respect to the misuse of EELs. Moreover, any such misuse would be

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71 *TRO* at ¶592.

72 *Id.*

prevented going forward through enforcement of the new restrictions on the use of EELs for long distance and CMRS.

Additionally, the EEL criteria are detailed and, if past practice is a guide, are likely to be subject to significant disputes as to their satisfaction.[73] Application of the rules will impose costs on carriers and ILECs alike in terms of contractual disputes over language incorporating the FCC rules, ordering procedures, audits, and the like, the adverse effects of which will ultimately flow downstream to consumers. Such adverse effects will likely include delays in ordering and provisioning new services, as well as making changes to existing services. Granting forbearance in the instant matter will protect consumers from downstream effects stemming from contractual disputes between ILECs and CLECs.

Accordingly, Joint Petitioners maintain that the instant request for forbearance is in the public interest and should therefore be granted.

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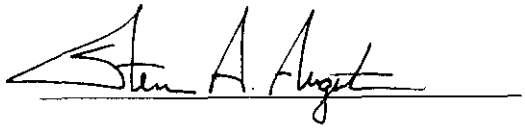
73 *Id.* ("[the record] discloses significant disagreements between incumbent LECs and competitive LECs over application and administration of use restrictions on high-capacity EELs.")

CONCLUSION

In light of the foregoing, Joint Petitioners request that the Commission forbear from enforcing those rules and policies adopted in the *TRRO* as provided for herein.

Respectfully submitted,

By: 

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Dated: March 28, 2005

ORIGINAL

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of March, 2005, copies of this Petition for Forbearance were served, via electronic mail and hand delivery, upon the persons listed below.

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